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No. 91-1859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

J. C. KEENEY,

Petitioner,

vs.

JOSE TAMAYO-REYES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER*
JEANNE M. ANDRACHEK
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Counsel of Record

QUESTION PRESENTED

Is "deliberate by-pass" or "cause and prejudice" the correct test for determining when a federal habeas petitioner will be excused for failing to develop a material fact in state proceedings?

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MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.4, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief amicus curiae in support of petitioners in the above captioned case. Counsel for petitioner has consented in writing, but counsel for respondent has refused consent.

In the accompanying brief, amicus argues that this Court should continue the process of limiting relitigation *de novo* on habeas corpus of questions already fully and fairly considered in the state courts. Specifically, amicus argues that the "cause and prejudice" test should apply to prevent relitigation of a factual issue on the basis of a deficiency in the state court proceeding caused by the defense itself.

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the relitigation of a question fully and fairly litigated in the state courts with proper respect for this Court's precedents and for the constitutional rights of the respondent. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, amicus requests leave to file its brief.

Dated: November, 1991

Respectfully submitted,

KENT S. SCHEIDEGGER*
JEANNE M. ANDRACHEK

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Counsel of Record

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

Respondent José Tamayo-Reyes got into a knife fight with his fiancée at a bar. Pet. Cert. 3. When a stranger attempted to intervene, Tamayo killed him. *Ibid*. Tamayo was charged with murder and pleaded no contest to manslaughter. *Ibid*. He was represented by counsel and had the services of a translator during these proceedings. *Tamayo-Reyes* v. *Keeney*, 926 F. 2d 1492, 1493 (CA9 1991).

In state collateral proceedings, Tamayo claimed that he had not received an adequate translation during the plea proceedings. *Ibid*. He was represented by counsel during these collateral proceedings. *Id*., at 1499. After a hearing, the state court found that Tamayo had received a full and accurate translation. *Id*., at 1495.

On federal habeas corpus, the magistrate found that the state court findings were presumed correct under 28 U. S. C. § 2254(d) and that no hearing was required. Pet. Cert. App. 38. The district court agreed. *Id.*, at 32. The Ninth Circuit reversed in part and remanded for an evidentiary hearing. *Tamayo-Reyes*, *supra*, 926 F. 2d, at 1502.

Addressing the state court findings that Tamayo received an accurate translation of the plea form and the plea proceeding, the Court of Appeals held that these findings were entitled to the presumption of correctness. *Ibid.* However, the Court of Appeals found inadequacies in Tamayo's attorney's presentation of the evidence regarding translation of the mental elements of manslaughter. *Id.*, at 500.

The Court of Appeals found that the failure to fully develop the facts, despite representation by counsel and a "full-blown hearing," *id.*, at 1498, did not constitute "inexcusable neglect" under *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963). "The standard for inexcusable neglect is deliberate bypass. . . . " *Tamayo-Reyes*, *supra*, 926 F. 2d, at 1501. Therefore, the court held, another evidentiary hearing was required. *Id.*, at 1502.

SUMMARY OF ARGUMENT

Townsend v. *Sain* has little value as precedent. It rests primarily on *Fay* v. *Noia*, which is a totally discredited decision. *Townsend* is inconsistent with both earlier, sounder precedent and with subsequent developments. The policies which underlie *stare decisis* call for this anomaly in the law to be removed.

Congress did not codify *Townsend*'s "inexcusable neglect" standard when it enacted 28 U. S. C. § 2254(d). Neither the statute nor the committee reports mention the specific point. The overall purpose of the 1966 enactment was to reduce the volume of habeas relitigation, in part by offering states incentives to provide their own remedies. That purpose would be defeated by a rule that so easily brushes aside the state court's findings.

The cause and prejudice standard adopted in other contexts provides the appropriate balance between finality and protection of criminal defendants.

ARGUMENT

I. *Townsend* v. *Sain* has little value as precedent.

A. Precedent.

In a case such as this one, where there is no reliance interest in a precedent, *stare decisis* rests on "the interest in stability and orderly development of the law." *Runyon* v. *McCrary*, 427 U. S. 160, 190 (1976) (Stevens, J., concurring). The stability factor, in turn, rests on the idea that the judge should " 'lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.' " *Id.*, at 191 (quoting B. Cardozo, *The Nature of the Judicial Process* 149 (1921)).

Justice Cardozo's metaphor helps explain why respect for *stare decisis* is "not a mechanical formula of adherence to the latest decision . . . ." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). The bricklayer should not blindly lay the new course of bricks on top of the last one without checking to see that the last one itself was laid straight. If the last course was laid without regard for the courses beneath it, then it should normally be removed before proceeding further.

The reasons for following precedent in criminal procedure cases were summarized this way in *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986) (citations omitted):

> "[T]he important doctrine of *stare decisis* [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitu-

> tional system of government, both in appearance and in fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' "

On occasion, however, the Court must confront a situation where the law *has* changed erratically, has *not* developed in a principled and intelligible fashion, and has taken a detour for reasons either unarticulated, unconvincing, or no longer true. In such a case, respect for *stare decisis* calls for overruling, not upholding, the errant case.

Fay v. *Noia*, 372 U. S. 391, 438 (1963) adopted the "deliberate by-pass" standard for procedural defaults. *Townsend* v. *Sain*, 372 U. S. 293 (1963) simply incorporated this standard from *Noia*. *Id*., at 317.

As we will demonstrate in the next two sections, *Noia* and *Townsend* disregarded precedent, are inconsistent with subsequent cases, and were based on assumptions which are no longer valid. This course of bricks is out of line with all the others, both earlier and later. Stability of the law calls for its removal.

B. Pre-Townsend Cases.

In the early habeas corpus cases, there were two lines of authority dealing with prior adjudications. One dealt with successive habeas corpus petitions, and the other dealt with relitigation of issues already passed on by state courts. The two lines were joined together in *Ex parte Hawk*, 321 U. S. 114, 118 (1944) and *Brown* v. *Allen*, 344 U. S. 443, 463 (1953), overruled in *Townsend*, *supra*, 372 U. S., at 312.

The first substantial post-Reconstruction discussion on repetitive applications is in *Ex parte Cuddy*, 40 F. 62 (C.C.S.D.Cal. 1889). Cuddy was held in contempt for attempting to improperly influence a juror. According to his second petition, the transaction took place a quarter mile from the courthouse. *Id*., at 63. Cuddy contended that his actions were not in the presence of the court, and therefore the court had no contempt jurisdiction. The relevant statute provided "that such power to punish contempts shall not be construed to extend to any case except the misbehavior of any person in their [the courts'] presence, or so near thereto as to obstruct the administration of justice . . . ." *Ibid*. (quoting from Rev. Stat. § 725).

The Supreme Court had decided Cuddy's first petition on the same day it decided a similar case, *Ex parte Savin*, 131 U. S. 267 (1889).[1] Savin had attempted to bribe a witness in the jury room and again in the hallway. *Id*., at 269. The *Savin* Court decided that "presence" was not limited to the personal presence of the judge but instead extended throughout the courthouse. *Id*., at 277.

Cuddy's first petition was limited to conclusory allegations of lack of jurisdiction supported only by the records of the contempt proceeding. *Ex parte Cuddy*, 131 U. S. 280, 281-283 (1889). From the contempt order it may be fairly inferred that Cuddy's actions did not occur in the personal presence of the judge, see *id*., at 281-282, but neither the petition nor the record indicate whether Cuddy approached the juror in the courthouse or elsewhere. *Id*., at 284. The Supreme Court affirmed denial of relief. *Id*., at 287.

The second application was made to Justice Field as circuit justice. After discussing other possible grounds for decision, Justice Field based his denial squarely on the ground of the prior petition.

> "If [petitioner] can renew [his application] on another record, which may also be in some other particular

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1. Both cases were argued April 25, 1889, and decided May 13, 1889. See 131 U. S. 267, 280.

defective, and so on indefinitely whenever he fails on appeal, it is plain that the writ may often become an instrument of oppression, instead of a means of relieving one from an unjust and illegal imprisonment. The writ of *habeas corpus*, it is true, is the writ of freedom, and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice of the kingdom having the right to grant such writs.

* * *

"In many instances great abuses have attended this privilege, which have led in some of the states to legislation on the subject. And, in the absence of such legislation, while the doctrine of *res judicata* does not apply, it is held that the officers before whom the second application is made may take into consideration of the fact that a previous application had been made to another officer and refused; and *in some instances that fact may justify a refusal of the second.*

* * *

"In what I have said I refer, of course, to cases where a second application is made upon the same facts presented, *or which might have been presented*, on the first. The question is entirely different when *subsequent occurring events* have changed the situation of the petitioner so as in fact to present a new case for consideration. In the present application there are *no new facts which did not exist* when the first was presented. And under the law of the United States an appeal is allowed to the supreme court where the writ is refused,—*a provision which would seem to have been adopted to prevent a second application upon the same facts which were or might have been presented in the first instance*. I am of the opinion that in such a case a second application should not be heard, except where the judgment of affirmance by the supreme court is rendered without prejudice to, or with leave to make a

new application by, the petitioner." *Cuddy*, *supra*, 40 F., at 65-66 (emphasis added).

Cuddy thus holds that as a general rule the first petition must present all facts in support of the petition which can be presented. There must be some good reason why the facts were not presented the first time to avoid a dismissal of the second petition. Significantly, there is no hint of a requirement that the petitioner's conduct has been inequitable in the sense that he is coming to the court with unclean hands. Cf. *Fay* v. *Noia*, 372 U. S. 391, 438 (1963); *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963). The lack of a good reason for not presenting the evidence on the first petition is sufficient to deny the writ.

Nonexistence of the supporting facts at the time of the first petition is obviously a good enough reason. The failure of the counsel to present those facts was not good enough in *Cuddy*, however. Cuddy appears to have been represented by counsel throughout the proceedings, see 131 U. S., at 281, and that fact may have had a bearing on the decision. Cf. *Price* v. *Johnston*, 334 U. S. 266, 291 (1948) (*pro se* petitioner).

In *Salinger* v. *Loisel*, 265 U. S. 224 (1924), the Supreme Court held that a prior habeas petition was not *res judicata* but that the common law rule of "independent judgment on each successive application" was no longer in effect. *Id.*, at 230-231. The mandate of Congress "to dispose of the party as law and justice may require" meant that the availability of appellate review and denial of prior habeas relief could "be considered, and even given controlling weight." *Id.*, at 231. *Salinger* quoted *Cuddy*, *supra*, with approval. *Id.*, at 231-232. Thus, the denial of a prior petition occupies some vaguely defined middle ground. It is less than *res judicata*, but a prior denial carries much more than the zero weight which it carried at common law.

Wong Doo v. *United States*, 265 U. S. 239 (1924) was decided the same day as *Salinger*. Wong Doo's first petition presented two grounds, but he put on no proof of the second. He then relied on the second ground for his second petition. *Id.*,

at 239-240. The Supreme Court held that the lower court erred in invoking the rigid bar of *res judicata* but that the case was so clearly an abuse of the writ that no remand was necessary. *Id.*, at 241. The Court believed that the evidence "was accessible all the time," *ibid.*, and Wong Doo was apparently represented by counsel.[2]

A second line of cases dealt with factual determinations by state courts. In *Frank* v. *Mangum*, 237 U. S. 309 (1915), petitioner's allegations of mob domination of the trial had been investigated by the state courts and found to be untrue. *Id.*, at 333. The Court held that this determination was not *res judicata*, *id.*, at 333-334, "but must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction." *Id.*, at 335-336.[3]

Moore v. *Dempsey*, 261 U. S. 86 (1923) is often cited incorrectly as repudiating *Frank*. See, *e.g.*, *Fay* v. *Noia*, 372 U. S. 391, 421 (1963). While the *Noia* majority thought the cases to be "almost identical," *ibid.*, the *Moore* majority did not.

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2. *Price* v. *Johnston*, 334 U. S. 266, 289-290 (1948) distinguished the earlier cases on the basis that Price's new petition raised a new issue. The fact that Price was *pro se* throughout the proceeding, see *id.*, at 291-292, was probably a factor as well.

3. There has been much hand-wringing over the *Frank* case by people convinced that Frank was innocent. See, *e.g.*, *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the Senate Judiciary Comm.*, 101st Cong., 1st & 2d Sess. 125 (1989-90) ("Hearings") (statement of Chief Judge Donald Lay). These critics generally ignore or gloss over the fact that Frank was not executed by the state, but was granted executive clemency. Compare *ibid.*, with L. Dinnerstein, *The Leo Frank Case* 139 (1968). Tragically, he was then lynched by vigilantes. Dinnerstein, at 141. In light of the general attitude toward the federal government in 1915 Georgia, it is highly likely that a federal writ would have produced the same result.

The *Moore* case was a virtual catalog of the federal constitutional violations recognized at the time. Testimony was extracted by torture. 261 U. S., at 89. Counsel was appointed immediately before the trial, had no opportunity to prepare, and presented no defense. *Ibid.* Blacks were systematically excluded from both the grand and petit juries. *Ibid.* Comparing Justice Holmes' description of the mob influence in *Moore*, *id.*, at 89-90, with his description in *Frank*, 237 U. S., at 345-346 (dissent), it is evident that a far greater degree of crowd influence had been alleged in *Moore*. Justice Holmes' opinion accepts *Frank* as binding precedent and distinguishes it on the facts:

> "We assume, in accordance with that case [*Frank*], that the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed. *It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way.* But if the case is that the whole proceeding is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights." 261 U. S., at 91 (emphasis added).

Thus, it is the magnitude of the alleged violation, according to *Moore*, that justifies reconsideration of questions already passed upon. "[C]laims of constitutional error are not fungible." *Rose* v. *Lundy*, 455 U. S. 509, 543 (1982) (Stevens, J., dissenting).

In *Ex parte Hawk*, 321 U. S. 114 (1944), the Court attempted to clear up the confusion surrounding habeas corpus. Much of the *Hawk* opinion is *obiter dicta*; the holding of the case is purely on the question of exhaustion. See *id.*, at 118. Even so, the discussion is enlightening.

> "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. *Salinger* v. *Loisel*, 265 U.S. 224, 230-232. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see *Mooney* v. *Holohan*, *supra*, [294 U.S.] 115, or because in the particular case the remedy afforded by state law proves *in practice unavailable or seriously inadequate*, cf. *Moore* v. *Dempsey*, 261 U.S. 86, *Ex parte Davis*, 318 U.S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless." *Ibid.* (emphasis added).[4]

The phrase "in practice unavailable or seriously inadequate" implies something more serious than disagreement with the state court's reasonable conclusion. *Hawk* seems to reconcile *Frank* and *Moore* on their facts on the basis later suggested by Professor Bator: that the state court in *Frank* had made a careful, reasoned determination, but the state court in *Moore* had not. See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 488-489 (1963).

Hawk's citation of *Salinger* is particularly significant, because it ties the successive federal petition line of cases together with prior state adjudication decisions. The prior state proceeding, in other words, is entitled to the same degree of respect as a prior federal court proceeding. Federal habeas corpus review, whether on the first or second petition, should be made available when other remedies are unavailable or inadequate. It should not be used to relitigate points already

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4. *Mooney* and *Davis* are both exhaustion cases where the state court remedy had not been shown to be inadequate or unavailable at the time of application for the writ.

fairly decided by a competent court.

The question of prior state adjudication was squarely presented in *House* v. *Mayo*, 324 U. S. 42 (1945), where the district court had denied a petition on the ground that the claim had been fully and competently litigated in the state courts. *Id.*, at 47. *House* expressly acknowledges that the district court's deference would have been correct had the state court ruled on the merits, citing *Hawk*, but reversed solely because the state court decision had been on the ground that the remedy sought was not available under state law. *Id.*, at 48. *House* elevates *Hawk*'s dictum to a holding.

When Henry Hawk returned to the Supreme Court on certiorari from denial of state collateral relief, the Court explained the allocation of responsibilities between the state courts, the federal habeas courts, and the Supreme Court:

> "When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. *White* v. *Ragen*, 324 U.S. 760. When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings." *Hawk* v. *Olson*, 326 U. S. 271, 276 (1945).

With this foundation, we come to the landmark case of *Brown* v. *Allen*, 344 U. S. 443 (1953). Justice Reed's opinion is the opinion of the Court on all points except the effect of the prior denial of certiorari. *Id.*, at 451-452. Although Justice Frankfurter sought to designate part II of the first of his two opinions as a second majority opinion, *id.*, at 497, it is not designated as such by the Court. Indeed, it is not fully joined by *any* other Justice, although others express a very general agreement. See *id.*, at 488 (Burton and Clark, JJ.) ("recognize the propriety of the considerations . . . "); *id.*, at 513 (Black and Douglas, JJ.) ("agree in substance").

The opinion of the Court holds that the state proceedings may not be disregarded. *Id.*, at 458. "[W]here there is material conflict of fact . . . , the District Court may properly depend upon the state's resolution of the issue." *Ibid.* Part III of the *Brown* opinion deals squarely with the issue in the present case: the right to a plenary hearing. A hearing is required only after the district court has decided to "entertain" the petition. *Id.*, at 461. In this context, "entertain" "means a federal district court's conclusion, after examination of the application . . . that a hearing on the merits legal or factual is proper." *Ibid.*

Explaining when a hearing would be proper, the Court explained that nothing in the 1948 revision of title 28 was intended to change the rule of *Salinger* v. *Loisel* that an application might be denied solely on the ground that the issues had been litigated before. *Id.*, at 463.

> "Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same principle [as *Salinger*]—a refusal of the writ without more, if the court is satisfied, by the record, that the state process has given *fair consideration* to the issues and the offered evidence, and has resulted in a satisfactory conclusion." *Id.*, at 463 (emphasis added).
>
> "As the *state and federal courts have the same responsibilities* to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, *without a rehearing of the facts*, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction. . . ." *Id.*, at 465 (emphasis added).

Where the records and the petition do not present an "extraordinary situation," the district court may properly grant a motion to dismiss. *Ibid.*

The *Brown* majority then proceeded without explanation to reexamine the legal questions on the basis of the state factual record. *Ibid.* Because of this fact and Justice Frankfurter's statements in his concurring opinion, *id.*, at 507-508, *Brown* was thereafter thought to establish a rule that the habeas petitioner was entitled to a *de novo* review on questions of law. See, *e.g.*, H.R. Rep. No. 1892, 89th Cong., 2d Sess. 5 (1966). This was a departure from the role of the habeas corpus court. From *Ex parte Royall*, 117 U. S. 241, 253 (1886) to *Hawk* v. *Olson*, 326 U. S. 271, 276 (1945), correction of error in the state court's resolution of the issue had been considered primarily the Supreme Court's responsibility on direct review of the state judgment. The reason for this shift is generally understood to be the growth of the country. The Court "could no longer perform its historic function of correcting constitutional error . . . and had to summon the inferior federal judges to its aid." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 154 (1970).

There did not at this time appear to be the same need as to factual determinations, however. The rule of *Salinger* and *Cuddy*, as made applicable to state prisoners in *Hawk* and *House*, was therefore retained by *Brown* as to factual determinations: "to prevent a second application upon the same facts which were *or might have been* presented in the first instance." *Ex parte Cuddy*, *supra*, 40 F., at 66 (emphasis added).

C. Fay v. Noia.

What changed between 1953 and 1963? The answer is suggested in Justice Frankfurter's concurrence in *Irvin* v. *Dowd*, 366 U. S. 717, 729-730 (1961). Inflammatory pretrial publicity was a common problem, according to Justice Frankfurter, exceeding the Court's capacity to correct. "For one reason or another this Court does not undertake to review all such envenomed state prosecutions." *Id.*, at 730. This statement indicates a belief that dereliction of duty was widespread among state courts. If so, deference to factual findings under *Brown* might lead to a large number of actual miscarriages of

justice.[5]

Although *Townsend* appears first in the official reports, *Fay* v. *Noia*, 372 U. S. 391 (1963) is actually the lead case of the pair. After a long and specious historical discussion, *id*., at 399-426, *Noia* announced its "deliberate by-pass" test for procedural defaults. *Id*., at 438. In doing so, it barely mentioned the flatly contrary rule of a landmark precedent squarely on point. See *Daniels* v. *Allen*, decided with *Brown* v. *Allen*, 344 U. S. 443, 487 (1953).

Noia today is a totally discredited decision. Its historical misrepresentations were quickly and thoroughly documented. See *Noia*, at 449-463 (Harlan, J., dissenting); Oaks, *Legal History in the High Court — Habeas Corpus*, 64 Mich. L. Rev. 451 (1966); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31 (1965). Its "sweeping language" was rejected as *dicta* in *Wainwright* v. *Sykes*, 433 U. S. 72, 87-88 (1977). *Noia* was overruled, albeit without the explicit use of that word, when the Court applied a different test and reached the opposite result on indistinguishable facts in *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991).

Particularly significant is *Coleman*'s recognition that *Fay* v. *Noia* undervalued the importance of finality. *Ibid*. This importance is not limited to state procedural rules, as *Coleman* recognizes, *ibid*., by its citation of *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991). In rejecting the deliberate by-pass standard for successive petitions, *McCleskey* recognized the importance of finality in a context where no state rule was involved. See *id*., 113 L. Ed. 2d, at 544, 111 S. Ct., at 1470.

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5. The *Irvin* majority dealt with the immediate problem at hand by rendering a dubious holding that pretrial publicity was a "mixed question" calling for *de novo* review of the jury *voir dire*, rather than a factual question calling for deference. Cf. *Patton* v. *Yount*, 467 U. S. 1025, 1036 (1984).

Townsend v. *Sain*, 372 U. S. 293, 317 (1963) states "The standard of inexcusable default set down in *Fay* v. *Noia* adequately protects the legitimate state interest in orderly criminal procedure . . . . " That statement has been repudiated by *Sykes*, *McCleskey*, and *Coleman*. To the extent *Townsend* relies on *Noia*'s evaluation of the competing interests, its foundation has been washed away.

D. Townsend v. Sain.

Townsend had confessed after being given a drug which the state said was treatment for his narcotics withdrawal but which Townsend said was a "truth serum." *Townsend*, *supra*, 372 U. S., at 299. At the state hearing, Townsend was represented by counsel and had an expert witness who testified at length about the properties of the drugs used. *Id*., at 302; *id*., at 332-333 (Stewart, J., dissenting).

A bare majority of the Court joined an opinion which is notable for both the breadth of its pronouncements and the dearth of authority to support them. See *id*., at 312-317; cf. *id*., at 327 (Stewart, J., dissenting). The contrary precedent of *Brown* v. *Allen* and the cases that led up to it were brushed aside. *Id*., at 312. Replacing the double-sided discretion of *Brown* and its antecedents was a list of conditions where a new hearing was mandatory, with continued open-ended discretion in all other cases. *Id*., at 318.

The majority held that a new hearing was required in Townsend's case for two reasons. First, it was said that there was no way to reconstruct the state judge's findings of fact from the record. *Id*., at 321. Second, and critically important to the present case, was the majority's criticism of the defense's presentation of the evidence:

> "To be sure, there was medical testimony as to the general properties of hyoscine, from which might have been inferred the conclusion that Townsend's power of resistance had been debilitated. But the crucially informative characterization of the drug, the characterization which would have enabled the judge and jury,

> mere laymen, intelligently to grasp the nature of the substance under inquiry, was inexplicably omitted from the medical experts' testimony. Under the circumstances, disclosure of the identity of hyoscine as a 'truth serum' was indispensable to a fair, rounded, development of the material facts. And the medical experts' failure to testify fully cannot realistically be regarded as Townsend's inexcusable default. See *Fay* v. *Noia*, 372 U. S. 438 (Part V)." *Id.*, at 321-322.

In other words, the fact that the defendant's medical expert did not speak plain English was a good enough reason to treat the state proceedings as a nullity. Four dissenting Justices agreed that this holding served "to debase the Great Writ of Habeas Corpus." *Id.*, at 334 (Stewart, J., dissenting).

The departure from precedent in *Townsend* and *Noia* can be justified, if at all, only on the basis stated in *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986): "to bring [the Court's] opinions into agreement with experience and with facts newly ascertained." *Townsend* and *Noia* reflect a truly dismal assessment of the state courts in the area of criminal procedure. Justice Frankfurter's gloom in *Irvin*, see *ante*, p. 13, contrasts sharply with his vigorous defense of the state courts in civil matters. See *Amalgamated Clothing Workers of America* v. *Richman Bros. Co.*, 348 U. S. 511, 518-519 (1955).

Perhaps this assessment was justified in 1963. It is not today. Since the criminal procedure revolution began, an entire generation of lawyers steeped in the Bill of Rights has graduated from law school, practiced in the courts, and been appointed to the state bench. The legal landscape today bears little resemblance to that of 1963. Would any state judge today, in response to a federal constitutional objection, assert that the case was being tried under the state and not the federal constitution? Cf. *Estes* v. *Texas*, 381 U. S. 532, 556 (1965) (Warren, C. J., concurring). Any judge who did would be the laughingstock of the state.

In *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 210, 110 S. Ct. 2822, 2830 (1990), this Court explicitly refused to adopt the low

opinion of state courts promoted by the supporters of unlimited habeas review. *Sawyer* rejected the unfounded, insulting allegation that state courts respect constitutional rights only because of the threat of federal habeas corpus. *Ibid.*; cf. *Hearings*, *supra* note 3, at 125. That same confidence in state courts justifies reconsideration of *Townsend*.

The *Townsend* decision was the result of a disregard of precedent, reliance on a since-discredited case, and a deep distrust of state courts unjustified in our time. Standing alone, its value as precedent is virtually nil. The only substantial argument for its retention is that Congress has codified it. Amicus will address that argument next.

II. Congress did not codify *Townsend*.

The assertion that Congress codified the status quo in 1966 would come as a great surprise to those who drafted and voted for the habeas corpus bill of that year. The committee reports of both houses exude a deep dissatisfaction with the flood of habeas petitions and a clear intent to change the law to reduce them. See H.R. Rep. No. 1892, 89th Cong., 2d Sess. 4-7 (1966) ("House Report"); S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966) ("Senate Report").

Subsection (d) of 28 U. S. C. § 2254 does, to be sure, adopt some of *Townsend*'s criteria for what is not a full and fair hearing in state court. One of those criteria is inadequate development of the facts. 28 U. S. C. § 2254(d)(3).[6]

The section says nothing, however, about when that inadequate development may be attributed to the petitioner so that he may not complain of it. *Townsend* expressly noted that

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6. As the Court of Appeals notes, *Townsend* deals with when a hearing is required, while the statute deals with a presumption. *Tamayo-Reyes*, *supra*, 926 F. 2d, at 1497. However, a presumption that petitioner cannot overcome and that is dispositive of the case renders an evidentiary hearing pointless.

such a circumstance existed. *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963). The question is whether any intent can be inferred from Congress's silence on the point.

There are several possibilities. First, by adopting an "inadequate development" exception with no express qualification, Congress may have intended to broaden the *Townsend* rule to apply to all inadequate development cases, even if deliberately caused by the defendant personally. Such a literal reading would be in direct conflict with the evident purpose of the legislation.

Second, it is possible that by lifting this language from *Townsend*, Congress intended to bring *Townsend*'s extremely liberal construction of "inexcusable neglect" along with it. As a mechanical matter of statutory construction, this argument has some appeal. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). For reasons we will describe below, however, it would conflict with the purpose and intended effect of the statute.

A third possibility is that Congress was unable to agree on this point. If so, it said nothing because, as a whole, it intended nothing. We saw this phenomenon quite explicitly in the 1990 crime bill. The House and Senate passed such strongly conflicting measures on habeas reform and capital punishment that the entire reform was "stripped from the crime bill by the conference committee." See *Statement by President George Bush Upon Signing S. 3266*, 8 U. S. Code Cong. & Admin. News, 101st Cong., 2d Sess. 6696-1 (1990). A less public and less obvious decision to do nothing due to deadlock might occur earlier in the process. A fourth, and closely related, possibility is that Congress did not think about the question at all.

"It would require very persuasive circumstances enveloping congressional silence to debar this Court from re-examining its own doctrines." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). No such circumstances are present with regard to *Townsend*'s "inexcusable neglect" standard. The key to interpretation, amicus submits, is whether a construction of 28

U. S. C. § 2254(d)(3) to codify *Townsend*'s variant of "inexcusable neglect" would further the purpose of the statute. The goal of interpretation "is the proliferation of purpose." Frankfurter, *supra*, 47 Colum. L. Rev., at 529.

The purpose of the 1966 legislation was to introduce greater finality of judgments to habeas proceedings, Senate Report, *supra*, at 2, and "to provide a qualified application of the doctrine of res judicata," House Report, *supra*, at 3. Subdivision (d) of section 2254 was intended to offer "a strong inducement to states that have not already done so" to develop adequate post-conviction remedies. Senate Report, *supra*, at 3.

These goals are defeated if a state proceeding can easily be brushed aside on the basis of factors entirely beyond the state's control. States will not be induced to conduct their own collateral reviews if those reviews are nothing more then a dress rehearsal for the "real" hearing in federal court. If a mandatory new hearing with no presumption of correctness is triggered by a Monday-morning quarterback critique of counsel's examination, the inducement which Congress intended will be lost. In times when government resources are stretched to the limit, few expenditures appear more wasteful than holding trials which do not settle the questions.

Construing 28 U. S. C. § 2254(d)(3) to carry with it *Townsend*'s approach to "inexcusable neglect" would be contrary to the purpose of the statute. That construction therefore should not be adopted.

III. The "cause and prejudice" standard should be adopted.

McCleskey v. *Zant*, 113 L. Ed. 2d 517, 546, 111 S. Ct. 1454, 1471 (1991) modified the "inexcusable neglect" standard previously applicable to successive petitions to conform to the "cause and prejudice" standard of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977) and *Murray* v. *Carrier*, 477 U. S. 478 (1986). Similar considerations of finality in this case call for the same result.

Carrier and *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) hold that, as a general rule, when counsel's failure to raise a claim at an earlier proceeding prevents the state courts from considering the claim, that failure is attributable to the defendant. See *Carrier*, 477 U. S., at 492; *Coleman*, 115 L. Ed. 2d, at 672, 111 S. Ct., at 2567. The responsibility for the lack of resolution of the claim must fall somewhere. Either the defendant loses the ability to litigate the claim, or the state loses the finality of a proceeding in which it has invested much time and resources. In a capital case, the state loses irretrievably the deterrent value of the execution of the judgment within a reasonable time.

The cause and prejudice standard marks a careful, if somewhat wavering, line in this allocation. An impediment external to the defense is "cause," and the burden of it falls on the state. *Carrier*, *supra*, 477 U. S., at 492. This is so even when the cause is beyond the control of either party and no fault of the state. See *Reed* v. *Ross*, 468 U. S. 1, 16 (1984) (novelty of claim).[7] Even ineffective assistance of counsel, although internal to the defense and generally beyond the state's control, is deemed attributable to the state in a proceeding where the defendant has a constitutional right to counsel. *McCleskey*, *supra*, 113 L. Ed. 2d, at 544, 111 S. Ct., at 1470.

The cause and prejudice standard makes a further exception where the error complained of has actually resulted in the conviction of an innocent person. *Id.*, 113 L. Ed. 2d, at 550, 111 S. Ct., at 1475. This exception ought to remove the objection that the defendant's punishment is the result of the attorney's error. McCleskey was not executed because of his attorney's omission of a claim. He was executed because he gunned down Officer Frank Schlatt while Officer Schlatt was bravely doing his duty to protect the people from crime. See *McClesky* v. *State*, 263 S. E. 2d 146, 147-148 (Ga. 1980); *McCleskey* v. *Zant*, *supra*, 113 L. Ed. 2d, at 550, 111 S. Ct., at 1475 (no doubt

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7. After *Teague* v. *Lane*, 489 U. S. 288 (1989), *Reed* v. *Ross* would apply only to cases within one of *Teague*'s exceptions.

of guilt). The procedural bar blocked a procedural claim; the sentence itself was right and just.

There is some force in the argument that certain claims are so fundamental that federal courts should reach them regardless of procedural rules and regardless of the defendant's guilt. See *Rose* v. *Lundy*, 455 U. S. 509, 543-544 (1982) (Stevens J., dissenting); *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923). One would be hard-pressed to argue that the parade of horribles in *Moore* should go uncorrected on any grounds. Such a further exception can be considered in the extremely unlikely event that such a violation escapes both state remedies and correction by this Court.

The issue before the Court on certiorari in the present case does not involve any allegation of such a fundamental violation. Tamayo had a lawyer and a translator at his plea proceeding. Pet. Cert. 3. The rule of *Henderson* v. *Morgan*, 426 U. S. 637, 646 (1976), that a defendant must be informed of the *mens rea* element of homicide before pleading, does not come close to the fundamental character of the rules violated in *Moore*.

According to state court findings which the court below held *were* entitled to the presumption of correctness, Tamayo received a proper translation of the plea form and plea proceeding. *Tamayo-Reyes* v. *Keeney*, 926 F. 2d 1492, 1502 (CA9 1991). In that duly translated form, Tamayo expressly represented to the state that his lawyer had advised him on the charge. He further expressly represented in open court that he understood the form. Pet. Cert. 4. The state did a thorough job of protecting Tamayo's rights. There is no fundamental unfairness here.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

KENT S. SCHEIDEGGER*
JEANNE M. ANDRACHEK

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Counsel of Record